IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH WAYNE STROOPS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 21154

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in the second count of a two-count indictment, at the conclusion of trial by jury [C.T. 2-4, 6].[1]

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21,

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1 "C.T." refers to the Clerk's Transcript of Record.

United States Code, Section 174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant and Thelma Davis were charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. Count One charged both defendants with conspiracy to smuggle and conceal, etc., narcotics [C.T. 2-3].

Count Two alleged that appellant and Thelma Davis knowingly concealed, and facilitated the transportation and concealment of, approximately one ounce of heroin, a narcotic drug, which, as they then and there well knew, had been imported and brought into the United States contrary to law [C.T. 4].

Jury trial of appellant and Thelma Davis commenced on March 29, 1966, before United States District Judge Fred Kunzel. A motion to suppress evidence was heard and denied during the trial. The Court granted a motion for judgment of acquittal at the conclusion of the evidence [R.T. 5-6, 117, 161].[2]

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2 "R.T. refers to the Reporter's Transcript of Proceedings on Appeal.

Appellant and co-defendant Davis were found guilty as charged in Count Two on March 30, 1966 [C.T. 5-6].

Thereafter, on May 16, 1966, appellant was sentenced to the custody of the Attorney General for five years. He subsequently filed a timely notice of appeal [C.T. 8, 16].

The conviction of co-defendant Thelma Davis was reversed upon appeal.

Davis v. United States, 382 F.2d 221 (9th Cir. 1967).

III

ERROR SPECIFIED

Appellant specifies eight points upon appeal, but his brief presents argument upon only three points:

1. Alleged insufficiency of the evidence.
2. Alleged unlawful search and seizure.
3. Alleged violation of Due Process of law in regard to discretionary powers of the United States Attorney's office.

IV

STATEMENT OF THE FACTS

IV

STATEMENT OF THE FACTS

A. THE MOTION TO SUPPRESS EVIDENCE.[3]

On January 28, 1966, United States Customs Agent Paul V. Martin observed a 1963 Chevrolet automobile that had just entered the United States from Mexico at the port of entry at San Luis, Arizona. Agent Martin's supervisor had instructed him to keep the vehicle under surveillance. The vehicle was stopped at the port but not detained for any length of time. Agent Martin followed the Chevrolet northward to Yuma, Arizona, where he lost sight of it for an estimated three or four minutes [R.T. 15-18].

Agent Martin then followed the Chevrolet westward until it stopped of its own accord at the California agricultural inspection station near Winterhaven, California [R.T. 16-17, 21-22]. All vehicles are stopped at this particular station. The occupants of the vehicle were appellant Stroops and Thelma Davis. Agent Martin asked them to leave the vehicle [R.T. 22, 27-29].

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3 Part of the evidence relating to the motion to suppress evidence was heard by the jury. Such evidence may be considered upon appeal.

Carroll v. United States, 267 U.S. 132, 162 (1925).

About five minutes later, Customs Agent George F. Holleron examined the purse of Thelma Davis and found a loaded 25-caliber automatic pistol in the purse.[4] Agent Holleron was the Acting Customs Agent-in-Charge at the Calexico, California, office, which also had Customs jurisdiction over Yuma, Arizona [R.T. 27-29].

Lieutenant Ramirez of the Imperial County Sheriff's office arrested Thelma Davis after the gun was found. Both suspects stated that the gun belonged to appellant Stroops, and he also was booked, being charged with a California concealed weapon offense [R.T. 32-34, 43-45].

Imperial County Deputy Sheriff Robert Russell transported Miss Davis to the Sheriff's substation in Winterhaven in a Sheriff's vehicle on that same evening. On the following day, Deputy Russell found the exhibit in question on the front seat of the same Sheriff's vehicle [R.T. 50-56].

Winterhaven was approximately 32 miles by road from the port of entry at San Luis. The Court took judicial notice of the fact that Winterhaven was not more than four or five miles from the Mexican border at Andrade, California [R.T. 101-102]. Agent Martin's surveillance of the vehicle

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4 The jurors were instructed to disregard the evidence relating to the gun [R.T. 117-118]. However, it might be relevant upon the search and seizure question.

lasted for approximately 45 minutes [R.T. 16-17].

The Court held that the vehicle was under suspicion, that the first search was a border search, that the exhibit was abandoned by Thelma Davis during the automobile trip to the Sheriff's office, that Thelma Davis had no standing to require suppression of the evidence, and that there was no probable cause. The motion to suppress evidence was denied [R.T. 108, 116-117].

B. THE TRIAL.

United States Customs Agent Paul V. Martin observed a 1963 Chevrolet automobile that had just entered the United States from Mexico at San Luis, Arizona, on January 28, 1966. The Chevrolet was followed by Agent Martin as it passed through Yuma, Arizona, to the California inspection station near Winterhaven, California. The vehicle was out of Martin's sight for an estimated three or four minutes at Yuma [R.T. 15-17].

Appellant Stroops and Miss Davis were in the Chevrolet when it approached the Winterhaven inspection station. Miss Davis was arrested at that station by Lieutenant Ramirez of the Imperial County Sheriff's Office [R.T. 15, 27-29, 32, 45]. She was transported to the Sheriff's substation in Winterhaven in a Sheriff's vehicle operated by Deputy Sheriff Robert Russell [R.T. 50, 52-53, 60, 82].

Approximately 11 grams of heroin were found on the front seat of the vehicle on the following day [R.T. 53, 58, 86-90]. The heroin had a selling price of from $100 to $150 in Mexico [R.T. 90]. At approximately 5:00 p.m. on the previous day, January 28, the vehicle had been searched for "any weapons left or anything in the vehicle." This type of search is for "Possible pocket knives, or weapons of some kind, or anything that may be dropped in there by prisoners that we bring in." [R.T. 56-57, 71].

Between the time of the search and the moment that the heroin was found in the vehicle, the only persons transported in the vehicle were Thelma Davis, Acting Matron Hazel Chandler, and four officers -- Deputy Sheriff Robert Russell (who found the heroin), United States Customs Agents George Holleron and Paul Martin, and Lieutenant Ramirez of the Imperial County Sheriff's office [R.T. 26-27, 50, 52-53, 56, 58-59, 82].

Mrs. Chandler testified that she had never seen the heroin exhibit before [R.T. 82]. The heroin was found near the middle of the front seat, a little to the driver's side [R.T. 57]. When Thelma Davis was transported in the vehicle, she was in the middle of the front seat. Deputy Sheriff Russell was driving, Mrs. Chandler was in the front on the passenger side, and Agent Holleron was in the rear seat [R.T. 53]. Miss Davis was not handcuffed [R.T. 63].

Between the time that Miss Davis was transported in the

vehicle and the moment of the discovery of the heroin, Deputy Sheriff Russell left the vehicle upon the following four occasions:

1. At the Sheriff's substation at Winterhaven, California. The vehicle was unlocked and remained there for about 30 or 40 minutes. The area was lighted [R.T. 53-54, 68, 70].
2. At a coffee shop. The vehicle was there for not more than 20 minutes. It was not locked, but the area was well-lighted, and Deputy Sheriff Russell could see the vehicle from the inside of the building [R.T. 77].
3. At the substation during the night. The front doors were locked. The rear doors were not locked, but a screen sealed off the front seat from the rear seat, with some spacing above and below the screen [R.T. 53, 59-60, 63-64].
4. At the Post Office for not more than three minutes, during which time Russell was inside of the Post Office. The vehicle was parked right in front of the door and Russell could see it while he was inside of the Post Office [R.T. 54-55].

The heroin was found in a matchbox that was under a cool cushion that would normally move toward the center of the seat when a person entered the vehicle [R.T. 55-57, 67]. The officer did not remember whether he looked under the cool cushion when he previously searched the vehicle [R.T. 57].

During the transportation of Miss Davis, the matron attempted to perform her duties properly, but it was the first time that she had ever assisted in the transportation of a prisoner. Miss Davis had her hands in her lap "most of the time." [R.T. 84-85]

The matchbox obviously was from Mexico [R.T. 179].

Appellant Stroops gave a false name to the officers. He claimed that he was "John Edwards"; that he had come from Santa Monica, California, to San Luis, Mexico, and that he had borrowed the car from his cousin, "Joe Stroops." [R.T. 32-33]

He testified that he was with a friend named "Leroy" during part of the trip [R.T. 137]. He had made a similar statement to an officer, stating at times that the friend was "Leroy" and at times that the friend was "P.M. Johnson" [R.T. 149]. However, he testified that he did not remember the name "P.M. Johnson" [R.T. 137]. The name, "P.M. Johnson," was written on a piece of paper which was in appellant's wallet when appellant was searched [R.T. 155].

Appellant Stroops also told the officer that he had a couple of girls in San Luis, but he denied this when he testified [R.T. 136, 149-150].

V

ARGUMENT

A. APPELLANT HAS NO STANDING TO OBJECT TO THE SEARCH OF THELMA DAVIS'S PURSE.

Appellant Stroops contends that the discovery of the heroin in the officer's vehicle was the product of a previous search. This may or may not be correct, as the heroin was abandoned in the officer's vehicle. Officers have the right to move cool cushions in their own vehicles. The movement of the cool cushion resulted in the discovery of the heroin.

However, it is not necessary to decide whether the discovery of the heroin was the product of an abandonment which would allegedly be the product of an arrest which would allegedly be the product of a search of Thelma Davis's purse, resulting in the discovery of the gun. The solution of this involved legal question is unnecessary, as appellant Stroops has no standing to object to the search of another person's purse.

Diaz-Rosendo v. United States, 357 F.2d 124, 130-34 (9th Cir. 1966);

Armada v. United States, 319 F.2d 793, 796 (5th Cir. 1963).

B. ASSUMING, ARGUENDO, THAT APPELLANT HAS STANDING TO OBJECT TO THE SEARCH OF ANOTHER'S PURSE, THE SEARCH WAS A LAWFUL BORDER SEARCH.

Appellant contenda that the search which resulted in the discovery of the gun was not a lawful border search.

The vehicle had crossed the border into the United States and had been followed by a Customs Agent from the point of entry to the point of search. The search of the purse was conducted by a Customs Agent [R.T. 15-16, 27-29].

It has been held that a border search need not occur precisely at the border.

King v. United States, 348 F.2d 814 (9th Cir. 1965), cert. denied, 382 U.S. 926 (1965);

Alexander v. United States, 362 F.2d 379 (9th Cir. 1966).

It also is well-established that probable cause is not required for a border search and that "mere suspicion" is sufficient.

Alexander v. United States, supra, at p. 382;

King, supra, at p. 817;

Rivas v. United States, 368 F.2d 703, 709 (9th Cir. 1966);

Bible v. United States, 314 F.2d 106, 108 (9th Cir. 1963);

Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961), cert. denied, 366 U.S. 950 (1961);

Blefare v. United STates, 362 F.2d 870, 874 (9th Cir. 1966);

People v. Furey, 248 NYS 2d 460, 462 (1964).

The trial Court heard the evidence relating to the search and concluded that suspicion was present [R.T. 108]. No other conclusion would be reasonable, for the officer would not have followed the vehicle for approximately 32 miles if he had not been suspicious. Additional evidence of high suspicion by the Customs officers is found in the appearance at Winterhaven of the man who was temporarily in charge of the entire Calexico-Yuma Customs Agency office covering portions of two states [R.T. 27-28].

The test of a border search away from the border appears in this Court's recent opinion in Alexander, supra, at p. 382:

> "Where, however, a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding

> circumstances, including the time and distance elapsed as well as the manner and extend of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States. Any search by Customs officials which meets this test is properly called a 'border search.'"

The facts of the instant case clearly meet the requirements of Alexander. The time elapsed amounted to approximately 45 minutes of surveillance and an additional 5 minutes at Winterhaven [R.T. 16-17, 28-29]. The distance was not more than 4 or 5 miles from the Mexican border and approximately 32 miles from the point of entry into the United States [R.T. 101-102]. The latter figure is considerably less than the distance of 75 miles from the border (i.e., the Rio Grande River) to the point of search in Ramirez v. United States, 263 F.2d 385 (5th Cir. 1959), in which case the search was considered to be a customs "points of entry" search (at p. 387). (As an additional ground for affirmance, the Court of Appeals also held that there were reasonable grounds to believe that a crime was being committed). The

distance herein was less than half of the distance from the border in Jones v. United States, 326 F.2d 124 (9th Cir. 1963), in which the search occurred about 67 miles from the border. The concurring opinion of Judge Duniway, which was not inconsistent with the majority opinion upon the question, held that the search was a border search. This concurring opinion by Judge Duniway was cited with approval by this Court in Hurst v. United States, 344 F.2d 327, 328 (9th Cir. 1965), and in Alexander, supra, at p. 382.

The lapse of an estimated three or four minutes in the surveillance herein is similar in length to the lapse of possibly one or two minutes in Alexander, supra, at p. 382.

This Court has held that "there is reason and probable cause to search every person entering the United STates from a foreign country, by reason of such entry alone."

Witt, supra, at p. 391(emphasis added), quoted in King, supra, at p. 817; in Blefare, supra, at p. 874; and in Jones, supra, at p. 130 (concurring opinion).

C. THE PROSECUTING ATTORNEY'S DISCRETIONARY AUTHORITY DID NOT VIOLATE DUE PROCESS OF LAW.

Appellant contends that he was deprived of Due Process of Law by the delegation of power to the United STates Attorney vesting discretionary authority to proceed under 21 USCA 174 or 26 USCA 4724.

The short answer to appellant's claim is that he failed to raise the issue in the trial Court.

Furthermore, appellant's claim has no support in the law. The two statutes involve separate offenses.

United States v. Garnes, 258 F.2d 530, 533 (2nd Cir. 1958).

There is no unconstitutional delegation of discretion to the prosecution. Congress properly "left the final choice in this matter to the discretion of the prosecutor." Garnes, supra, at p. 533. (See also, Witt, supra.)

Stating the matter differently, it is proper and desirable for litigants to have the opportunity of avoiding trial by means of compromise settlement. To prohibit this would be absurd.

D. ASSUMING, ARGUENDO, THAT THE EVIDENCE WAS INSUFFICIENT, A NEW TRIAL SHOULD BE PERMITTED.

Assuming, arguendo, that the evidence was insufficient to sustain the conviction of appellant Stroops, it is respectfully submitted that a new trial should be permitted.

The Government has additional evidence that was not utilized at the trial herein. This might well be sufficient, in view of the fact that the sufficiency of the Thelma Davis case was very close (she did not even raise the issue of

sufficiency of the evidence in her opening brief).

The closeness of the issue is also indicated by the results in other cases involving a separation between the suspect and the contraband. For example, in Galvan v. United States, 318 F.2d 711 (9th Cir. 1963), the heroin evidence was obtained from a load of garbage pulled out of a garbage truck by officers. The garbage had come from a trash can from a residence unconnected with the defendant, other than the fact that he and his vehicle came to rest on the front lawn of that residence after a wild flight from the officers. Residents had picked up the heroin at the front of the house on the morning after the flight, assumed that it was a quantity of marshmallows, and threw it into the trash. There was some other evidence, and the conviction was unanimously affirmed by this Court.

Other relevant cases are Ketchum v. United States, 259 F.2d 434 (5th Cir. 1958) (sack of marihuana found on side of highway), and Vaccaro v. United States, 296 F.2d 500, 504 (5th Cir. 1961) (marihuana found along side of road about 24 hours after suspect passed by in vehicle).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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